STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0136

State of Minnesota,
Respondent,

vs.

Danny Lee Zinski,
Appellant.

Filed January 22, 2018
Reversed and remanded
Reyes, Judge

Washington County District Court
File No. 82-KX-95-004671

Lori Swanson, Attorney General, Assistant Attorney General, St. Paul, Minnesota; and

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

REYES, Judge

Appellant challenges his convictions of first-degree burglary and fourth-degree criminal sexual conduct, arguing that the district court's widespread admission of

relationship-evidence testimony without a limiting instruction as to its proper, limited purpose, both when the evidence was introduced and in the final jury instructions, was plain error affecting his substantial rights. We reverse and remand.

FACTS

On September 28, 1995, after D.S. ended her relationship with appellant Danny Lee Zinski, he telephoned her many times telling her that he wanted to "make love" to her one last time. D.S. told appellant that he was not welcome in her home.

D.S. awoke the next morning to find appellant sitting next to her wearing only his underwear. He told her he wanted to "make love" one more time. She refused. D.S. testified that appellant got on top of her, ejaculated on her leg, and wiped his semen off with an article of clothing. Later that day, D.S. called 911 and filed a police report.

On October 3, 1995, appellant was charged in Washington County District Court with first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c), and fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(c). The prosecution amended the burglary charge to gross-misdemeanor harassment in violation of Minn. Stat. § 609.748, subd. 2. Appellant pleaded guilty to the gross-misdemeanor-harassment charge in exchange for the dismissal of the criminal-sexual-conduct charge. The district court sentenced appellant to one year in jail, with 305 days stayed for a two-year probationary period.

On October 31, 2013, appellant filed a postconviction petition seeking withdrawal of his guilty plea, which the postconviction court denied. Appellant filed a notice of appeal with this court. We reversed the postconviction order and remanded the case for

withdrawal of the guilty plea. *Zinski v. State*, No. A14-0984, 2015 WL 4171341 (Minn. App. 2015).

At a hearing following remand, the district court appointed counsel for appellant, ordered the plea withdrawn, and reinstated the original charges of first-degree burglary and fourth-degree criminal sexual conduct. At jury trial, the district court allowed the state to present relationship evidence testimony pursuant to Minn. Stat. § 634.20 (2016) from four witnesses. No limiting instruction was requested or provided relating to any of the relationship-evidence testimony. The jury found appellant guilty of both charges. The district court sentenced appellant to 78 months imprisonment for first-degree burglary and 21 months imprisonment for fourth-degree criminal sexual conduct, to be served consecutively. This appeal follows.

D E C I S I O N

Appellant argues that the district court committed plain error affecting his substantial rights when it failed to provide a limiting instruction both when the relationship-evidence testimony was provided and when the district court provided the jury instructions. We agree.

Relationship evidence is admissible under Minn. Stat. § 634.20 if: (1) it is domestic conduct by an accused against the victim of domestic conduct or against other family or household members and (2) its probative value is not *substantially* outweighed by the danger of unfair prejudice. Minn. Stat. § 634.20 (2016) (emphasis added). Domestic conduct includes but is not limited to evidence of domestic abuse, a violation of an order for protection, violation of a harassment restraining order, stalking, or obscene or harassing

telephone calls. Relationship evidence may be used as direct evidence "offered to prove an element of the [charged] offense" and is "offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159-60 (Minn. 2004) (citing *State v. Cross*, 577 N.W.2d 721, 725 (Minn. 1998)).

Absent an objection, we review the admission of relationship evidence for plain error. *State v. Barnslater*, 786 N.W.2d 646, 653 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010) (citing Minn. R. Crim. P. 31.02). An unobjected-to alleged error will be corrected upon a finding of: (1) error; (2) that was plain; and (3) that affects the appellant's substantial rights. *State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). An "error" is defined as a "[d]eviation from a legal rule [ ] unless the rule has been waived." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014) (quoting *United States v. Olano*, 507 U.S. 725, 732-33, 113 S. Ct. 1770 (1993)). *See also State v. Peltier*, 874 N.W.2d 792 (Minn. 2016); *State v. Moore*, 863 N.W.2d 111, 119-122 (Minn. 2015); *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (concluding jury instruction materially misstating the law satisfied the "error" prong of the plain-error analysis).

Once error is established, we must next determine whether the error is plain, based on "the law in existence at the time of appellate review." *Kelley*, 855 N.W.2d at 277. "An error is plain if it is clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010).

Next, we must determine whether the plain error affected appellant's substantial rights. This occurs if the plain error was "prejudicial and affected the outcome of the case." *Ihle*, 640 N.W.2d at 917. We look "at the entire record to determine if there is a significant likelihood that the jury misused the evidence." *Meldrum*, 724 N.W.2d at 21-22. If this three-prong test is satisfied, the error should be corrected if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quotation omitted).

I. The district court's failure to provide a limiting instruction was plain error that affected appellant's substantial rights.

Here, appellant argues, and the state concedes, that the district court's failure to provide a limiting instruction both when four different witnesses provided relationship evidence testimony and in its final jury instructions constitutes an error that was plain. We agree.

Even absent a request from the defendant, the district court should give proper limiting instructions when relationship evidence is admitted, both at the time the evidence is presented and in the final jury instructions, *Meldrum*, 724 N.W.2d at 21, because of the potentially prejudicial nature of relationship evidence. *See id.* In *Meldrum*, we noted that the danger of the jury misusing relationship evidence is so significant that a limiting instruction should be given before the admission of the evidence and failure to do so was error. *See id.* In *State v. Word*, we subsequently held that "[i]n light of our decision in *Meldrum*, the district court should have issued cautionary instructions related to the proper use of relationship evidence, and the failure to do so represented error that was plain[,]"

but such plain error did not require reversal because it did not affect appellant's substantial rights. 755 N.W.2d 776, 785 (Minn. App. 2008). In *State v. Barnslater*, we held that "[i]n light of our decisions in *Word* and *Meldrum*, the district court's error in failing to instruct the jury regarding the proper use of the relationship evidence was plain," but, like in *Word*, this plain error did not affect appellant's substantial rights. 786 N.W.2d 646, 654 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). Based on our relationship-evidence precedent, the district court's failure to provide a limiting instruction prior to the introduction of relationship evidence and in its final jury instruction was plain error.

We acknowledge this court's recent opinion in *State v. Melanson*, ___ N.W.2d ___ (Minn. App. 2018). The *Melanson* court held that the district court's failure to give a limiting instruction sua sponte regarding the admission of relationship evidence was not plainly erroneous based on its interpretation of *State v. Taylor*, 869 N.W.2d 1 (Minn. 2015). *Melanson*, ___ N.W.2d at ___. *Melanson* is distinguishable.[1]

[1] We note that the *Melanson* opinion relies on *Taylor*, a non-relationship-evidence case, to argue by analogy. Impeachment, *Spreigl*, and relationship evidence all share the same danger of convicting a defendant based on the fact-finder's belief that evidence of prior bad acts is proof of the defendant's propensity to commit the bad act that he or she is being tried for, but relationship evidence differs in key aspects. First, admission of relationship evidence does not have the same evidentiary safeguards afforded to impeachment and *Spreigl* evidence. *See State v. Swanson*, 707 N.W.2d 645, 654-655 (Minn. 2006) (requiring district courts to consider five factors from *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978) before admitting prior convictions for impeachment); *State v. Ness*, 707 N.W.2d 676, 685-686 (Minn. 2006) (concluding that five-step process developed by supreme court must be met prior to admission of *Spreigl* evidence). Second, rules 609 and 404(b) contain modified-rule 403 balancing tests that provide the defendant with a lighter burden for excluding the evidence than the standard-rule 403 balancing test for relationship evidence under Minn. Stat. 634.20. *Compare* Minn. Stat. § 634.20 (Minn. R. Evid. 403); *with* Minn. R. Evid. 404(b) ("probative value of the evidence is not outweighed by its potential for unfair prejudice"); *and* Minn. R. Evid. 609 ("probative value outweighs its prejudicial

The *Melanson* opinion is limited to its particular facts. *Melanson*, ___ N.W.2d at __ ("*the* district court's failure to give a limiting instruction sua sponte regarding the admission of relationship evidence was not plainly erroneous" (emphasis added)). The *Melanson* court's opinion did not overrule *Meldrum*, *Barnslater*, or *Word*. Indeed, *Melanson* noted that, "Given the facts presented in *Barnslater* and *Word*, we held that, in those cases, the district court's failure to provide a limiting instruction sua sponte was plain error." *Melanson*, ___ N.W.2d at ___ (citing *Barnslater*, 786 N.W.2d at 654; *Word*, 755 N.W.2d at 785-86).

Given our facts, the district court's failure to provide a limiting instruction constituted plain error because it violated the legal rule established in *McCoy*, which created an evidentiary standard for relationship evidence pursuant to Minn. Stat. § 634.20. 682 N.W.2d at 160. Section 634.20 states that relationship evidence is admissible "unless the probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." In contrast to the facts in *Melanson*, here the district court's admission of relationship evidence given by several individuals, *infra*, was highly prejudicial, needlessly cumulative, and was a departure from the *McCoy* legal standard because it substantially outweighed the probative value of providing evidence to put the relationship in context.

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effect"). Third, impeachment and *Spreigl* evidence must also meet a higher standard of proof prior to their introduction. *Compare* Ness, 707 N.W.2d at 686, *with* Minn. Stat. § 634.20.

Because the plain and error prongs are met, we next look at the entire record and consider several factors to determine if a district court's plain error affected the defendant's substantial rights, including the pervasiveness of the relationship-evidence testimony, *State v. Beng*, No. A11-1974, 2012 WL 3792243, *5 (Minn. App. Sept. 4, 2012), the strength of the state's case, *Meldrum*, 724 N.W.2d at 21-22, the state's use of the evidence during closing argument, *id.*, whether the court provided a limiting instruction, *see Word*, 755 N.W.2d at 785-86, and whether the court properly instructed the jury, *id.* We address each factor in turn.

A. The relationship evidence constituted a significant amount of the state's case-in-chief.

First, we consider the pervasiveness of the relationship evidence. At trial, D.S. provided highly prejudicial testimony regarding her strained, abusive, six-year relationship with appellant. She testified that appellant frequently verbally degraded her and physically abused her by slapping and punching her. D.S. described an incident when appellant allegedly slapped and punched her in the stomach when she was pregnant with appellant's child. She testified that appellant threatened to kill her, the children, and himself. Her direct examination comprised 54 pages of the trial transcript, and six of those pages were relationship evidence. The district court did not give a limiting instruction when the state presented this testimony to the jury to put it in its proper context.

D.S.'s friend, J.B., testified that appellant always seemed like he was angry and frequently yelled at D.S. She testified that she witnessed a lot of name calling and verbal abuse by appellant. Her direct examination comprised ten pages of the trial transcript, and

two of those pages were relationship evidence. The district court did not give a limiting instruction when the state presented this testimony to the jury.

D.S.'s friend, S.H., testified that appellant was verbally abusive to D.S., would swear at her, and called her names. Her direct examination comprised 11 pages of the trial transcript, and two of those pages were relationship evidence. The district court did not give a limiting instruction when the state presented this testimony to the jury.

D.S.'s son, L.S., testified that appellant and D.S. were in an ongoing daily fight. He said that appellant "constantly degraded" D.S. by telling her that she was worthless. L.S. testified that he observed appellant strike his mother on quite a few occasions. As a result of the abuse, D.S. felt like she was worthless but she did not know how to get out of her relationship with appellant.[2] L.S.'s direct examination comprised 11 pages of the trial transcript, and five of those pages were relationship evidence. The district court did not give a limiting instruction when the state presented this testimony to the jury.

Two police officers also testified during the state's case-in-chief. Neither officer provided relationship-evidence testimony.

Fifteen of the 107 pages of the transcript, or nearly 15% of the state's case-in-chief, were relationship evidence. *See generally State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (improper suggestions comprising one of 64 pages of transcript was not pervasive); *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006) (misconduct comprising 20 of 80 pages of cross-examination was pervasive). Applicable here is the First Circuit's

[2] We note that, although not an issue on appeal, the testimony at trial contained a number of statements lacking foundation or that were hearsay.

observation that "[t]here is a line past which the [state's] introduction of relevant evidence for the legitimate advancement of its case goes too far. When that line is crossed, fair play morphs into piling on." *United States v. Mehanna*, 735 F.3d 32, 63 (1st Cir. 2013). That is what occurred here. The state's case-in-chief relied on a significant amount of relationship-evidence testimony, including highly prejudicial testimony.

B. The state emphasized the relationship-evidence testimony during its closing argument.

Another factor we consider is whether the state's closing argument emphasized the relationship-evidence testimony. During closing argument, the state argued that, prior to the alleged incident, everyone knew "what was going on in that trailer at the time" and that "[t]his was brewing months, weeks in advance." The prosecutor emphasized the relationship-evidence testimony, stating:

> Other relationship. Other evidence. Relationship evidence. We heard. We heard what was going on. [D.S.] described it. [J.B.] described it. [S.H.] described it. [L.S.] described it. Who downplayed it? Who's the only one that didn't remember certain things? Defendant. Of course defendant doesn't remember open hand slapping [D.S.]. That's what [L.S.] said. Ten plus times. It's all there.

Evidence of "domestic conduct" under section 634.20 is admissible only "to demonstrate the history of the relationship between the accused and the victim of domestic abuse." *Barnslater*, 786 N.W.2d at 650. The state used the relationship evidence to argue that appellant has a propensity to abuse D.S. and that he was worthy of punishment.

C. The strength of the state's case was not overwhelming absent the relationship-evidence testimony.

We also consider the strength of the state's case. Here, the state presented no physical evidence at trial. Instead, J.B., S.H., L.S., and both police officers testified as to D.S.'s behavior and statements in the hours following the incident. D.S. testified at trial consistent with prior statements she had made to police officers, her friends, and L.S. However, this evidence, viewed in context with the extensive amount of relationship evidence the state presented, the state's emphasis on the relationship evidence during its closing argument, and the lack of any limiting instruction, significantly diminished the strength of the state's case.

D. The district court did not provide any limiting instructions prior to the introduction of any of the relationship evidence.

As previously stated, the district court did not do so.

E. The district court did not provide any limiting instructions in its final jury instructions.

As discussed above, the district court did not provide one here.

In other cases, we have held that, in part, the district court's failure to provide a limiting instruction during the evidentiary phase did not affect the defendant's substantial rights because the jury instructions that were given sufficiently minimized the risk of unfair prejudice. *Barnslater*, 786 N.W.2d at 654; *Word*, 776 N.W.2d at 785. That is not the case here. The district court's final instructions included a general statement of the state's burden to prove the case beyond a reasonable doubt, the elements of the charged offense, an instruction that the jury should not consider evidence of appellant's *previous convictions*

as evidence of guilt for the crimes charges, and a recitation that the jury should presume the appellant innocent until proved guilty. There is nothing in the record to indicate that appellant was convicted for any of the prior conduct described in the relationship evidence. The district court's jury instructions, when considered as a whole, did not reduce the risk that the jury would improperly convict appellant for the relationship-evidence incidents rather than the charged offense.

In reviewing the entire record, the relationship-evidence testimony affected appellant's substantial rights. Because the relationship evidence was dramatic, it prejudiced appellant and created "a significant likelihood that the jury misused the evidence" in the absence of any limiting instructions. *See Meldrum*, 724 N.W.2d at 21-22.

Having concluded that the error was plain and affected appellant's substantial rights, we must consider whether reversal is required "to ensure the fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). In *Griller*, the supreme court held that an improper jury instruction regarding an affirmative defense did not entitle the defendant to a new trial because that would have been "an exercise in futility and a waste of judicial resources." *Id.* We cannot say the same here. Allowing appellant's conviction to stand when there is a reasonable probability that, absent the district court's prejudicial plain error, appellant may not have been convicted, requires that we reverse to ensure the fairness and integrity of judicial proceedings.[3]

Reversed and remanded.

[3] Because we reverse and remand on the issue of relationship evidence, we need not address appellant's pro se arguments.